together, the jury find themselves in genuine doubt as to whether or not the case falls within one of the exceptions, then their verdict on the point must be in favour of the accused."

As regards provocation the present case was very much a borderline one. We found it quite impossible to say what view the jury would have taken had they been directed in what we consider the proper terms and it was for that reason that we set aside the conviction for murder and substituted for it the conviction for culpable homicide not amounting to murder.

Conviction for murder set aside and conviction for culpable homicide substituted.

Solicitors: *Lim, Lim & Oon.*

ESA & ORS. v. PUBLIC PROSECUTOR

[A. Cr. J. (Adams J.) June 20, 1962]

[Muar — Criminal Appeal Nos. 9-11 of 1962]

Criminal Law and Procedure — Joint trial — Same offence or offences in the course of same transaction — Criminal Procedure Code (Cap. 6), ss.163 and 170.

Road Traffic — Using omnibus in contravention of terms of licence — Road Traffic Ordinance, 1958, s.120(2) — Whether driver was carrier under Ordinance — Whether evidence of similar offences admissible — Prosecution to prove that vehicle was being operated in contravention of conditions in licence.

This was an appeal by the driver of an omnibus, the company operating the omnibus and its manager against the conviction by the Magistrate for using the omnibus in contravention of the terms of the licence under which it was operated and punishable under section 120(2) of the Road Traffic Ordinance, 1958. It was contended, *inter alia*, for the appellants: (1) the trial of the 3 defendants together contravened section 163 of the Criminal Procedure Code and was therefore a nullity, (2) the driver could not have been charged for carrying more passengers than the vehicle could carry because the only person that carries is the carrier and not the driver, (3) it must be proved that the company was the registered owner before section 138 can operate, (4) as the offence was absolute the evidence of similar offences led was not admissible as it did not fall within the example outlined in *Rex* v. *Raju & Ors.* (4), and (5) the prosecution failed to prove that the company were licensed under Part V of the Ordinance and the licence which was produced was not a licence at law.

Held: (1) as the defendants were charged with the same offence or of different offences committed in the course of the same transaction there was no reason why they should not be tried together as it was more convenient that they were so tried. Principles enumerated in *Foo Yong Fong* v. *R.* (2) applied;

(2) as the person who carries is the carrier (i.e. the company) the first appellant could not have been convicted for using the vehicle. He should have been charged and could have been convicted of the abetment of the commission of the substantive offence by the company;

(3) there must be some evidence on the record that the company of which a defendant is alleged to be the manager is the registered owner of the vehicle. As a report that the company were the owners were not amplified the manager could not be deemed to have committed the offence and should not have been called to make his defence;

(4) as the offence was absolute, the evidence of similar offences led was not admissible as it did not fall within the examples outlined by Spenser Wilkinson J. in *Rex* v. *Raju & Ors.* (4). It would be evidence against the manager who was being proceeded against under section 138(4) of the Ordinance;

(5) the prosecution failed to prove that the vehicle was being operated in contravention of conditions by the licence which authorised its use — following *The Coastal Bus Co. Ltd.* v. *Public Prosecutor* (6).

Cases referred to:—

(1) *Rex* v. *Dennis* and *Rex* v. *Parker* [1924] 1 K.B. 867.

(2) *Foo Yong Fong & Anor.* v. *R.* [1962] M.L.J. 156.

(3) *Spires* v. *Smith* [1956] 2 All E.R. 277.

(4) *Rex* v. *Raju & Ors.* [1953] M.L.J. 21.

(5) *Reg.* v. *Khoo Guan Teik* [1957] M.L.J. 128.

(6) *The Coastal Bus Co. Ltd.* v. *Public Prosecutor* p. 324, *supra.*

CRIMINAL APPEAL.

F. Keith Sellar for the appellants.

Raja Azlan Shah (Legal Adviser) for the respondent.

Adams J.: This was an appeal by Esa bin Khamis, the driver of an omnibus No. JA. 6965, the Omnibus Company operating the omnibus, and Mr. Ong Seng Swee who was the manager of the defendant omnibus company, against the conviction by the Magistrate, Batu Pahat, for an offence arising out of the use of the vehicle in contravention of the terms of the licence under which it was operated.

I would like to draw attention at the outset to the fact that this case was conducted in the Magistrate's Court by the Hon'ble the Legal Adviser and not by the Deputy Public Prosecutor. It may therefore be assumed that it was appreciated from the outset that this case was likely to raise legal difficulties. In those circumstances, without in any way wishing to belittle the ability of the Magistrate, Batu Pahat, the case should have been put into the President's list so that someone who was legally qualified could apply his mind to the legal problems which were obviously going to arise, and which have occupied this Court during the morning.

Secondly, although Mr. Ong Seng Swee appeared in answer to the summons served upon him, no doubt upon the advice of Mr. Sellar, it would appear to me that it indicates slovenly investigation, and careless issue of process by the issuing Magistrate, to issue a summons addressed to 'Manager', Coastal Omnibus Company. I trust that Magistrates, on receiving such applications in future will instruct the police to address the summons to the person who as a result of their investigation they know to be the manager or managing director at the material time, that is to say at the time the offence was committed.

The defendant, Esa bin Khamis was charged as follows:—

"That you on the 9th day of August, 1961, at about 12.30 p.m. at the junction of Jalan Jeragan and Minyak Beku, in the District of Batu Pahat, in the State of Johore, being the driver of Stage Bus No. JA: 6965 licensed under Part V of the Road Traffic Ordinance, 1958, did use the said stage bus in contravention of a condition attached to the licence under the provisions of section 119 of the said Ordinance, to wit carrying passengers in excess of the specified number mentioned in the said licence, and you thereby committed an offence punishable under section 120(2) of the said Ordinance."

The defendant, the Coastal Omnibus Company Ltd. was charged as follows:—

"That you, being the holder of Licence No. 17460 granted under Part V of the Road Traffic Ordinance, 1958, in respect of stage bus No. JA: 6965, did on the 9th day of August, 1961, at about 12.30 p.m. at the junction of Jalan Jeragan and Minyak Beku, in the District of Batu Pahat, in the State of Johore, fail to comply with a condition attached to such licence under the provisions of section 119 of the said Ordinance, to wit did use the said stage bus carrying passengers in excess of the specified number mentioned in the said licence, and that you thereby committed an offence punishable under section 120(2) of the said Ordinance."

The defendant manager was charged as follows:—

"That the Coastal Omnibus Company Limited, holder of licence No. 17460 granted under Part V of the Road Traffic Ordinance, 1958, in respect of stage bus No. JA. 6965, did, on the 9th day of August, 1961 at about 12.30 p.m. at the junction of Jalan Jeragan and Minyak Beku, in the District of Batu Pahat, in the State of Johore, fail to comply with a condition attached to such licence under the provisions of section 119 of the said Ordinance to wit it used the said stage bus carrying passengers in excess of the specified number mentioned in the said licence, and that you being the manager of the said Coastal Omnibus Company Limited thereby committed an offence under section 138(4) and punishable under section 120(2) of the said Ordinance."

The facts are not disputed. On the 9th August, 1961, which was also the day of the festival of *Mandi Saffar*, Esa bin Khamis was driving the motor omnibus JA. 6965 from Batu Pahat towards Minyak Beku which is on the coast. The omnibus was stopped by the police and was found to be carrying 32 passengers. It was alleged by the prosecution that the omnibus was only licensed by the proper authority to carry 16 passengers. As a result the summonses to which I have referred were issued.

I would say at once that I note with disapproval that although the alleged offence was committed on the 9th August, 1961, the summons were not issued in the case of Esa bin Khamis until the 3rd September and made returnable on the 22nd November. The summons against the company was not issued until the 24th March, and the summons against the manager was not issued until the 3rd April. I hope that this sort of thing will not happen again. The obvious person to proceed against is the owner, and there is no excuse at all for the delay either in applying for the summons or for fixing a return date 2½ months after the issue of the summons.

There were six grounds of appeal against the conviction of Esa bin Khamis and the Coastal Omnibus Company and seven grounds in the case of the manager. I will deal with them *seriatim*.

The first ground was in effect that the trial of the three defendants together contravened section 163 of the Criminal Procedure Code, and was therefore a nullity. He cited *Rex* v. *Dennis* and *Rex* v. *Parker* [1] but this is an English case and the procedure on indictment is very different. It has always been the practice in this country to try defendants in cases of this sort and in my view there is definite power to do so under section 170 of the Criminal Procedure Code. According to the way the Road Traffic Ordinance is construed (and I will have to go into this later in this judgment) the defendants are all charged either with the same offence or with different offences committed in the course of the same transaction. There was no reason why they should not be tried together and indeed it was much more convenient that they were so tried. The Magistrate considered the matter and exercised his discretion to overrule the objection of Mr. Sellar. In fact this matter has been considered by Sir Alan Rose C.J. in *Foo Yong Fong & Anor.* v. *Regina* [2]. Although the circumstances in that case are very different from the present one, the principles enumerated by the learned Chief Justice are the same and apply equally here. I think that there is no substance in this ground of appeal.

The second ground of appeal is more complicated. Both the driver and the owners are charged with using the vehicle while it was carrying more passengers than it was licensed to carry. On the authority of *Spires* v. *Smith* [3] Mr. Sellar argued that the substantive offence is the carrying, and that the only person that carries is the carrier, and not the driver and therefore the driver could not have been so charged. He should have been charged with the abetment of the substantive offence. There is a very great difference between the provisions of law under which *Spires* was prosecuted and the Road Traffic Ordinance of the Federation of Malaya. Spires was charged with unlawfully failing to comply with the provisions of Regulation 4 of the relevant English Regulations, in that he permitted a stage carriage to be used to carry passengers in excess of the maximum number permitted by the regulations. The punishment regulation reads:

"If any person contravenes or fails to comply with any such regulation he shall for each offence be liable on summary conviction to a fine not exceeding £20".

Section 119 of the Road Traffic Ordinance gives the Licensing Board power to attach conditions to licences in relation to a road service licence, and one of those conditions is that passengers in excess of a specified number shall not be carried. If a breach of such a condition occurs it becomes punishable under section 120(2) which reads as follows:—

"The holder of such licence or any person using or causing or permitting the use of a vehicle in respect of which such licence has been issued, who fails to comply with any condition attached to such licence under the provisions of this section or section 119 shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding six months or to a fine not exceeding two thousand dollars or to both such imprisonment and fine."

Spires v. *Smith* decided that it was the owner of the vehicle that carried and not the driver or the conductor, and Lord Goddard went on to point out that the driver or conductor could not be charged with permitting the carrying as it was not a substantive offence. There was nothing in

the Regulations to say that a driver or conductor must not permit the entry of excess passengers into the omnibus. I agree that the company must be the carriers and that the driver only aided and abetted. I do not think he can be said to cause the vehicle to be used other than in compliance with the conditions of the licence. This was recognised, I think in 1950 when the original Motor Vehicles (Commercial Use) Regulations were yet again amended by L.N. 580 so that the original Regulation 6 which was the punishment Regulation was further amended to make a person who aided or abetted the use of a vehicle other than in accordance with the terms of the regulations guilty of an offence.

It might be argued that there is a difference between this case and *Spires* v. *Smith* in that the charge here is of failing to comply with the conditions of the licence, whereas in *Spires* v. *Smith* it was failure to obey a specific regulation. At one time I thought that that might make a difference and that in allowing excess passengers to be on the omnibus, the driver had therefore caused a failure to comply with the condition of the licence, and that this was the offence. But this is not so. The offence lies in the carrying of passengers in excess of those permitted by the licence to operate the omnibus. The person who carries is the carrier, that is to say the omnibus company. They are the persons who use this vehicle and they carry the passengers and they operate it over their authorised routes.

It would seem to me. therefore, that Mr. Sellar's submission is well founded and that Inche Esa could not have been convicted for using the vehicle and that he should have been charged and could have been convicted of the abetment of the commission of the substantive offence by the company.

As far as the manager is concerned, once it was proved against the company being the registered owners of the vehicle, that they were guilty of an offence then by virtue of the provisions of section 138(4) the manager is also deemed to be guilty. Mr. Sellar argued that section 134 of the Road Traffic Ordinance can only be relied upon where it is set out in the charge that the company is the registered owner. That is not so. He argued further that there must be proof that the company was the registered owner before that section 138 can operate. With that proposition I certainly agree. For some reason this evidence was not extracted from Sub-Inspector Yahya with any clarity. He deposed:—

"I also found out the name of the Bus Co. Coastal Bus Co. Ltd., Batu Pahat."

Mr. Sellar argued that was not sufficient. It might mean anything. They might not be the registered owners at all. The vehicle might be on charter. I would agree, and say that there must be some evidence on the record that the company of which a defendant is alleged to be the manager is the registered owner of the vehicle. In this case the statement that the Coastal Omnibus Company Ltd. are the owners of the omnibus is set out in the report. This evidence could easily have been amplified by the proper examination of the Sub-Inspector who would no doubt have been able to depose that not only were the company the owners but they were the registered owners of the omnibus concerned. This was not done, and the manager could not be deemed to have committed an offence and he should not have been called upon to make his defence, but should have been acquitted at the close of the prosecution's case.

The next ground of appeal was that as the offence was absolute, the evidence of similar offences led was not admissible as it did not fall within the examples outlined by Spencer Wilkinson J. in *Rex* v. *Raju & Ors.* [4]. With this proposition I agree except that it would be evidence against the manager who was being proceeded against under the provisions of section 138(4) of the Road Traffic Ordinance to negative his defence that the offence was committed without his consent or connivance and that he had exercised such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all the circumstances. But such evidence ought not to be admitted where the manager is being tried together with the registered owner being a body corporate or with a driver, as it would only prejudice the case against the other two defendants. Indeed as Mr. Sellar pointed out there is really very little need to prosecute the manager unless there is clear evidence that he has been neglecting his duty.

Mr. Sellar then argued that the prosecution had failed to prove that the Coastal Omnibus Company Ltd. were licensed under Part V of the Road Traffic Ordinance, and that the licence that was produced was not in fact a licence at all. The onus of proving the licence and its conditions in this case lies on the prosecution. As Rigby J. said in *Reg.* v. *Khoo Guan Teik* [5]:

"The gravamen of all these offences was that the respondent, being a duly licensed rubber purchaser, failed to comply with the statutory requirements imposed upon the holder of any such licence. It was, therefore, essential for the prosecution to prove that he was the holder of such a licence."

I have had the opportunity of reading the judgment of Ismail Khan J. in *The Coastal Bus Co. Ltd.* v. *Public Prosecutor* [6] which decides this very point and I do not wish to go over again ground which has already been covered by Ismail Khan J. It suffices to say that as the licence to operate stage carriages was issued to the defendant company before the coming into force of the Road Traffic Ordinance such licence as was necessary was issued under the provisions of the Motor Vehicles (Commercial Use) Regulations as amended by the Motor Vehicles (Commercial Use) (Amendment) Regulations, 1948. By virtue of sections 121 and 152 of the Road Traffic

Ordinance these licences are deemed to be issued under the Road Traffic Ordinance. The effect of regulation 3(4) is that no person is permitted to use a motor vehicle as a stage carriage unless such user is authorised by a Road Service Licence and the proviso reads as follows:

"Provided that for the purpose of this paragraph a comprehensive permit issued by the Commissioner under these Regulations shall be deemed to be a road service licence during the period of the validity thereof."

Regulation 4(2) prescribes that the conditions set out in the Second Schedule to the Regulations shall apply to and be the conditions of the respective permits enumerated in Parts I, II and III of the Schedule. These conditions relate to the terms under which stage carriages may be operated. It would seem to me, therefore, that what must be produced to the Court to prove that the defendant company is licensed to operate a stage carriage is a road service licence, that is the comprehensive permit and nothing else since very obviously the document produced in Court does not contain all the conditions under which the defendant company is permitted to operate its stage carriages.

Nobody has attempted to explain what Exhibit P.2 really is, but on the face of it, it clearly is not the document which authorised the use of the vehicle as a stage carriage.

The prosecution has failed, therefore, to prove that the vehicle was being operated in contravention of the conditions imposed by the licence which authorised its use and the appeal bv the defendant company must, therefore, be allowed.

There was one further ground of appeal. The police report was tendered duly certified in the Malay language and there was no translation supplied. I do not think that this is a good ground for allowing this appeal, but it should be clearly understood that documents should be translated so that they may be understood by the accused and his counsel, and although I do not consider that it is necessary to prepare a translation of every police report in the Malay language, if the accused or counsel requests a translation, and asks that the document be excluded until they have read and considered a proper translation, that is a reasonable request which must be granted. There may well be something in the report which is not admissible or is otherwise objectionable and the accused and his counsel have every right to see and understand the document before it goes in so that they may have an opportunity of lodging an objection.

For the above reasons the appeals must be allowed and the sentences against the three appellants quashed. The fines, if paid, must be refunded.

Appeal allowed.

Solicitors: *Sault, Keith Sellar & Co.*

FAR EAST CORPORATION LTD. v. SHUN CHEONG STEAM NAVIGATION CO. LTD.

[C.A. (Buttrose, Chua and Wee Chong Jin JJ.) June 27, 1962]

[Singapore — Civil Appeal No. 4 of 1962]

Bills of Exchange — Dishonoured cheques — Claim to set off and counterclaim against agents — R.S.C., 1934, O.XXII rr.11, 12 and 15 and O.XXXI r.6 — Stay of execution pending arbitration.

Practice and Procedure — Counterclaim against a co-defendant along with plaintiff — Points on which defendant has to satisfy court.

Where an action is between the immediate parties to a bill of exchange and the matters relied on by the defendant afford no defence under the Bills of Exchange Act the judge in chambers may properly, in the exercise of the powers vested in him, give liberty to the plaintiff to sign immediate judgment without a stay. In such cases the court treats the execution of a bill of exchange either as analogous to a payment of cash or as amounting to an independent contract within the wider contract in pursuance of which it was executed and not dependent as regards its enforcement on due performance of the latter. *James Lamont & Co.* v. *Hyland* (1) applied.

Before a defendant can plead a counterclaim against a co-defendant along with the plaintiff he must satisfy the court that the relief which he seeks is against *inter alios* the plaintiff and that the counterclaim relates to the subject matter of the plaintiff's claim. *Koh Chooi Peng* v. *Chung Kok Sang & Ors.* (2) approved.

In this case the plaintiffs (respondents in this appeal) claimed $86,000 against the defendants (appellants in this appeal) as drawers of two cheques for $43,000 each dated September 2 and 10, 1961, respectively payable to the plaintiffs which were duly presented for payment on November 13, 1961, but dishonoured. Notice of dishonour was given to the defendants by letter dated December 29, 1961. The defence was that those cheques were handed by the defendants to the plaintiffs as agents for a shipping company, the owners of the vessel *Obokil* as collateral security for the payment of charter hire due on redelivery of the vessel on completion of her charter period. The defendants alleged that the company was indebted to them in the sum of $141,349.34 being money paid by the defendants on their behalf in connection with another vessel owned by the company. The defendants claimed to set off against the plaintiffs' claim an equal amount of the debt due to them, i.e. $86,000. The defendants counterclaimed $55,349.34 being the amount alleged to be due to them after deducting the sum of $86,000, the amount of the plaintiffs' claim.

After the defence was filed the plaintiffs applied by motion under O.XXXI r.6 to sign judgment for $86.000 and to have the defendants' counterclaim struck out or excluded under O.XXII r.15. On the motion coming on before Rose C.J., the plaintiffs were given judgment for $86,000. A stay of execution was ordered pending conclusion of arbitration proceedings between the defendants and the company relating to the counterclaim in these proceedings and the counterclaim was ordered to be excluded under O.XXII r.15. It was further ordered that the costs of the motion be taxed and paid by the defendants to the plaintiffs [See formal order made on the 2nd day of February, 1962].

The defendants appealed from that order and the plaintiff cross-appealed against that part of the order imposing stay of execution.

Held: (1) on the facts of the case and applying the principles in *James Lamont & Co.* v. *Hyland* (1), the plaintiffs were entitled to the judgment they sought without a stay;

(2) the counterclaim was not maintainable against the plaintiffs themselves but only against the company and was in relation to an entirely separate contract in respect of a different vessel. It had nothing to do with the plaintiffs;